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No. 06-1408

IN THE
SUPREME COURT OF THE UNITED STATES

Bahig Bishay

Petitioner,

v.

Citizens Bank of Massachusetts

Respondent.

On Petition For A Writ Of Certiorari
To The Court of Appeals For The First Circuit

BRIEF IN OPPOSITION

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May 24, 2007

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RULE 29.6 STATEMENT

The parent corporation of Respondent, Citizens Bank of Massachusetts, is Citizens Financial Group, Inc. No publicly held company owns 10% or more of the stock of Respondent.

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OPINIONS BELOW

This Petition for a Writ of Certiorari fails to inform this Court, or include in the Appendix, any materials related to the first Petition for a Writ of Certiorari filed by this Petitioner against this Respondent and denied by this Court in 2003. See Bishay v. Citizens Bank, 539 U.S. 915, 123 S. Ct. 2280 (2003). That original petition and denial are relevant to this request because the current decision of the First Circuit Court of Appeals dismissing the complaint, from which the Petitioner now seeks leave to appeal, is based on the finding that the state court judgments in the first case were entitled to full faith and credit. A copy of relevant pages of Petitioner's First Petition, Respondent's opposition thereto (including relevant pages of the original state court decisions), and Petitioner's reply brief are reproduced in the Respondent's Appendix here. (R.A., 1a – 46a).[1]

STATEMENT OF THE CASE

The *pro se* Petitioner fails to present any of the bases articulated in Rule 10 of the Rules of the Supreme Court of the United States for entitlement to the rare exercise of this Court's discretion to grant certiorari. More significantly, the questions presented do not even involve the basis of the decision rendered by the First Circuit Court of Appeals from which the Petition flows. The First Circuit affirmed the District Court's dismissal of Petitioner's complaint for the reasons set forth in that court's decision (i.e., impermissible collateral attack on a state court judgment) and because the previous state court decisions are entitled to full faith and credit. (P.A., 2a - 10a). The Petitioner ignores these holdings and, instead, attempts to once again argue his underlying theory of bank collection malfeasance which has

[1] The Petitioner's Appendix will be cited as (P.A.); the Respondent's as (R.A.)

been adversely adjudicated against him time and again. Accordingly, the Petition should be denied.

STATEMENT OF FACTS

This is the thirteenth year of this litigation dispute. A full statement of historic facts appears in the Respondent's Appendix at 9a – 17a. For this Petition, it is enough to recount that Bahig Bishay ("Bishay") brought a series of lender liability claims against Citizens Bank of Massachusetts ("Citizens") by way of counterclaims to a collection action. All of Bishay's claims were dismissed by the Massachusetts Appeals Court, which affirmed the Massachusetts Superior Court summary judgment decisions. Further appellate review was sought from and denied by the Massachusetts Supreme Judicial Court. Thereafter, a petition for certiorari was sought from and denied by this Court. See 539 U.S. 915, 123 S. Ct. 2280.

As part of the Superior Court's summary judgment decisions, Citizens was awarded its attorneys' fees in defending against Bishay's counterclaims. Those fees were reimbursed from a letter of credit ("LOC") that Bishay was required to post in a related bankruptcy proceeding that paralleled the state court action. (R.A., 35a - 46a). The propriety of the award of those fees was argued during the first appeal and the order was affirmed. (R.A., 22a - 33a; P.A., 3a). All of this was resolved by 2003, including the denial of certiorari by this Court.

In 2005, Bishay brought a new complaint in Federal Court. That complaint was styled as one for breach of contract and was ostensibly based on the improper draw on the LOC to reimburse the court-awarded attorneys' fees. The reason alleged for the improper draw was that Citizens had "entered"

into a contract with Bishay pursuant to which it agreed to allow Bishay to "try" his claims before a tribunal. The "contract" allegedly entered into was the Plan of Reorganization approved by the Bankruptcy Court that, among other things, included the requirement that Bishay post the LOC.

The "breach" of this "contract" by Citizens resulted from Citizens moving for summary judgment as opposed to allowing Bishay to have a full-blown trial on all his claims. (P.A., 8a). The basis of the trial court's[2] allowance of Citizen's motion was further evidence of breach because Citizens argued that the Plan of Reorganization was *res judicata* as to many of Bishay's claims. In other words, the same "contract" by which Citizens "agreed" to allow Bishay to try all of his claims was used by Citizens to summarily dispose of those very same claims.

After reviewing these allegations, the District Court dismissed the complaint holding that Bishay was attempting to collaterally attack the State Court decisions in the guise of a contract action tied to the LOC. (P.A., 9a – 10a). The First Circuit affirmed, further noting that the scope of the reservation clause had "already been decided in state court, whose rulings are entitled to full faith and credit. Bishay cannot now relitigate the matter in Federal Court." (P.A., 4a). This Petition followed.

REASONS FOR DENYING THE PETITION

Bishay fails to present any basis on which this Court traditionally exercises its discretion to grant certiorari. He has not argued that the decision of the First Circuit, based as it is on

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[2] The Superior Court in the first action.

straight forward application of preclusion principles, is in conflict with that of another court of appeals; it is not. He has not argued that federal preclusion principles relied on by the First Circuit conflict with those of the Massachusetts Supreme Judicial Court; they do not. Nor has he argued that the preclusion principles relied on by the First Circuit represent an important question of federal law as to which this Court has yet to rule; this Court of course has routinely articulated the parameters of such principles. Instead, Bishay simply argues that the previous state court judgments from the first action were decided incorrectly and thus the current decision of the Federal Circuit is likewise incorrect. This is precisely the type of argument that Rule 10 of the Rules of the Supreme Court states will rarely result in a grant of certiorari. In light of the thirteen years of litigation, the number of courts that have ruled on these issues, and the importance of the concept of finality, the request for certiorari should be denied again.

A. Bishay Does Not Assert a Basis Under Rule 10 For the Grant of Certiorari

Although the bases on which this Court typically grants certiorari are not circumscribed by Rule 10, Rule 10 does set forth the general situations for the rare exercise of this Court's discretion. Thomas v. American Home Prods., 519 U.S. 913, 916, 117 S. Ct. 282, 284 (1996) (Rehnquist, C.J. dissenting). The decision of the First Circuit from which this Petition flows involves the routine application of preclusion principles. Nowhere does Bishay argue that the First Circuit's decision is in conflict with that of its sister circuits. Nor does Bishay argue that the Court's application of these well worn principles conflicts with the application of state law principles by the Massachusetts Supreme Judicial Court. In fact, Bishay argues

nothing about the First Circuit decision whatsoever. Instead, he ignores it completely and simply argues (or more appropriately, reargues) the propriety of the original state court judgments that were decided adversely to him in the first case and over which this Court previously refused to grant certiorari. 539 U.S. 915, 123 S. Ct. 2280. Given the complete absence of any argument as to why the basis of First Circuit decision (i.e., impermissible collateral attack on a state court judgment) warrants review by this Court, this Petition must be denied.

B. All Of This Has Been Decided Before

Bishay posits two issues to justify this appeal: (1) may a lender refuse to release its liens if the borrower repays the debt in full; and (2) whether the Plan of Reorganization approved in an earlier bankruptcy case was a contract that Citizens breached. These were the very same issues that were battled over in the first case that ultimately resulted in a petition for certiorari that this Court rejected. For example, during the first case, Bishay argued that the "refusal to accept full payment of the loan constituted (1) a breach of its obligations to him . . ." (R.A., 29a). The Massachusetts Appeals Court rejected that argument as follows:

> Even if we were to consider those claims not barred by the release and res judicata principles; they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay . . . ."

(Id.)

The characterization of the Plan of Reorganization as a contract that should be interpreted against Citizens and which Citizens breached was also argued in the first action. (P.A., 7a – 8a). The arguments were also specifically addressed in the briefing involving the first petition for certiorari. (See R.A., 4a, 19a – 20a).

It is for these reasons that both the District Court and First Circuit held that the second complaint was an improper collateral attack on the first state court judgment. (P.A., 3a – 9a). This litigation has lasted for over thirteen years. Courts at every level of the state and federal systems have found Bishay's claims meritless. Still Bishay persists, wasting the resources of both Citizens and this Court. The Petition should be denied.

C. There is No Basis to Refuse to Enforce the Preclusion Principles Relied on By The First Circuit

One of the fundamental precepts of our judicial system is that of finality of litigation. This Court has long recognized the central purpose played by issue and claim preclusion principles. E.g., Montana v. United States, 440 U.S. 147, 153-154, 99 S. Ct. 970, 973-74 (1979). Although the *pro se* Petition is not entirely clear, it appears that Bishay is arguing that if left undisturbed, the decision of the Massachusetts Appeals Court will have national implications. Implicit within that assumption is the further assumption that the enforcement of private loan agreements governed by individual state law implicates some larger federal policy. Of course, no legal precedent is cited now, or was cited in the first petition, for such an assertion. Rather, the dispute below was once between a private party and a state chartered bank. The rights and obligations between the

parties were governed by Massachusetts law. The only interplay with federal law concerned the effect to be given a bankruptcy order (i.e., the Plan of Reorganization) in connection with claims emanating from that private banking relationship. Bishay elected to wage that battle in state court. He lost. He sought certiorari for that decision to this Court. The request was denied. He filed a second action in the federal court seeking to undo the state court decision. He lost that gambit. All of this punctuates that this dispute is nothing more than an all too frequent example of a litigant not being able to take no for an answer. It is the reason claim preclusion principles were developed. Bishay argues nothing to cause this Court to ignore the application of those principles. The petition should be denied.

CONCLUSION

For the reasons set forth herein, Citizens requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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May 24, 2007

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No. 02-___

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

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April 7, 2003

QUESTION PRESENTED

The Bankruptcy Code provides that "a plan [of reorganization] may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3).

The question presented is whether, notwithstanding 11 U.S.C. 1123(b)(3), a bankruptcy confirmation extinguishes a debtor's claims against a creditor despite the facts that (a) the plan of reorganization expressly preserves the debtor's right to pursue all claims he may have against that creditor, and (b) the creditor is indisputably aware that the claims have been preserved.

* * *

provision to suggest that the plan must specifically identify each and every claim and/or interest belonging to the debtor that may be subject to retention and enforcement." *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 158 (Bankr. D. Del. 2002). Neither the Appeals Court nor any other court has pointed to any language in the statute or in its legislative history justifying a *per se* rule that a claim may be preserved only if it is identified specifically. To the contrary, the legislative history of Section 1123(b)(3) mirrors the statute itself in contemplating the retention of claims after plan confirmation: "The plan may also provide for the treatment of claims by the debtor against other entities that are not settled before the confirmation of the plan." H.R. REP. NO. 95-595, at 406-07 (1977).

Second, the Appeals Court violated a core principle of contract interpretation. "Because a [bankruptcy] plan is often more akin to a contract than a disputed order, general contract principles ought to be applied to its interpretation." *UNR Indus., Inc.* v. *Bloomington Factory Workers*, 173 B.R. 149, 157 (Bankr. N.D. Ill. 1994); see also *Cohen*, 279 B.R. at 160; *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 592 (D. Del. 2002). This Court has recognized the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The Appeals Court violated this rule by reading the reservation clause out of the contract entirely.

Third, the Appeals Court violated "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62. Bishay's reservation clause is clear and unambiguous; but even if it were not, its ambiguities should be resolved against the drafter — Citizens. In *Peltz*, the court enforced such a clause because, *inter alia*, "[p]rior to a plan's confirmation, creditors have the opportunity to examine the terms of the proposed plan and respond accordingly." 280 B.R. at 592. In *Bishay*,

* * *

No. 02-1479

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, assuming this Court has jurisdiction in light of the separate, adequate and independent state grounds supporting the dismissal, the Massachusetts Appeals Court's determination that the confirmation order was res judicata as to the Petitioner's counterclaims against Respondent was correct where the court's decision was based on the facts that:

(a) the plan of reorganization contained general language in the reservation clause;

(b) the Petitioner had ample opportunity to contest the plan or seek its modification; and

(c) statements made by counsel at the confirmation hearing were contradictory.

* * *

majority of courts addressing the issue have ruled consistently with the Appeals Court. The few cases that Bishay cited as articulating a different standard are either distinguishable on their facts or simply dicta.

In any event, what Bishay overlooks is that this Court lacks jurisdiction because the dismissal of Bishay's claims is, from the face of the Appeals Court's decision and the unappealed portions of the Superior Court's decisions, supported on separate, adequate and independent state law grounds. Accordingly, the Petition must be denied.

STATEMENT OF FACTS[5]

On June 8, 1988, Neworld Bank, Citizens' predecessor-in-interest, and Bishay entered into a Revolving Credit Agreement, Demand Note and Personal Guarantee (collectively, the "Loan Documents") in the amount of $2,560,000. (P. App. 12a) The Demand Note contained Bishay's unconditional promise to repay on demand. (*Id.*) The Revolving Credit Agreement reiterated the fact that the obligation was payable on demand, but in no event was to be repaid later than June 8, 1989. (P. App. 13a) Bishay did not repay the loan in 1989. Instead, between June 1989 and August 1993, the date for repayment of the debt was extended seven times – the first three times in the form of extension agreements; the last four as forbearance agreements. (P. App. 14a-15a) The last of these extensions, agreed to in August 1993, set a new maturity date of June 30, 1994. (P. App. 15a) This extension also required Bishay to make monthly principal payments of $7,500, plus accrued interest. (*Id.*) On

5. The majority of the facts set forth herein are restated in either the Appeals Court's or the Superior Court's decisions. Those that are not are taken from the 12 volume record appendix that accompanied the appeal before the Appeals Court. *See* Sup. Ct. R. 12.7.

April 14, 1994, Neworld merged into Citizens. (P. App. 16a) On April 18, 1994, Bishay wrote to Neworld and informed it that he was ceasing monthly principal payments due to cash flow problems caused by large expenses incurred in the start up of a new Isuzu automobile dealership. (P. App. 15a) On May 9, 1994, Citizens sent a written default letter to Bishay. (P. App. 16a) Following Bishay's continuing payment default in May 1994, Citizens accelerated the debt by letter dated June 15, 1994. (*Id.*) The August 1993 forbearance agreement otherwise would have matured by its terms two weeks later on June 30, 1994.

Over the next 2½ months, Citizens and Bishay negotiated yet another forbearance agreement, which was ultimately executed on September 16, 1994 (the "September 1994 Agreement"). (P. App. 17a) During this 2½ month period, Bishay was also in negotiations with the Federal Deposit Insurance Corporation (the "FDIC") to work out an unrelated default of a loan that was secured by one of Bishay's properties (1095 Comm. Ave.), which happened to also constitute additional security for the Citizens loan.[6] While negotiating with Bishay, Citizens contacted the FDIC to determine whether it might purchase the FDIC loan so that Citizens would obtain a first lien position on that property to further secure its loan. Nothing came of these discussions (P. App. 16a); however, because they occurred, Bishay leveled repeated allegations of wrongdoing against Citizens during this negotiations period. (*Id.*) Ultimately, a new forbearance agreement was agreed to in the form of the September 1994 Agreement. The September 1994 Agreement provided that: (1) the maturity date was extended to July 31, 1995; (2) Bishay was obligated to make a $1 million partial principal payment on or before January 31, 1995; and (3) Bishay (and any related entities)

6. Citizens held a second mortgage behind the FDIC.

released all possible claims against Citizens and Neworld. (P. App. 17a-18a)

Bishay failed to make the required $1 million partial principal payment in January 1995. (P. App. 18a) On February 10, 1995, Citizens again executed an extension agreement extending the $1 million payment obligation until April 30, 1995. (*Id.*) On or about March 24, 1995, Bishay made a partial payment of approximately $750,000 towards this $1 million interim obligation. (P. App. 18a-19a) Bishay made no further payments prior to April 30, 1995, and, on May 4, 1995, Citizens again accelerated the obligation. (P. App. 19a) Citizens commenced this action in the Superior Court in June 1995 to recover the balance of the outstanding debt, plus continually accruing interest and costs of collection. (*Id.*)

Bishay filed an answer and counterclaim asserting two counterclaims based solely on Citizens' conduct in the "summer and fall of 1994" that allegedly constituted a breach of the implied covenant of good faith and fair dealing and a violation of Massachusetts General Laws, chapter 93A ("c. 93A"). (*Id.*) Soon thereafter, both Bishay's and 1095 Comm. Ave.'s bankruptcy petitions were filed by Bishay. (P. App. 19a-20a) On November 1, 1995, Bishay and 1095 Comm. Ave. filed a Joint Disclosure Statement (the "Debtors' Disclosure Statement") and Proposed Plan of Reorganization. The Bankruptcy Court refused to approve the Debtors' Disclosure Statement (and, as a result of the preclusion from soliciting creditors' votes, the Proposed Plan of Reorganization), ruling, on December 13, 1995, that it failed to contain adequate information. On December 27, 1995, the Bankruptcy Court appointed a Trustee for Bishay's bankruptcy estate, supplanting Bishay as debtor-in-possession.

In early November 1995, Bishay's counsel made a single inquiry of Citizens' counsel concerning the hypothetical terms of a payoff of Citizens' loan. (R. App. 8a and n.11) Citizens responded that the terms would include payment in full plus a general release of all claims, real or imagined. (*Id.*) Bishay never pursued the issue further; never tendered any money whatsoever; and, indeed, never produced a commitment letter from any new financing source. (*Id.*)

On April 23, 1996, following a two-day evidentiary hearing, the Bankruptcy Court issued an order (the "Confirmation Order") confirming the Chapter 11 plan first proposed by Citizens, as amended by the First and Second Modifications to Chapter 11 Plan (collectively, the "Plan"). (P. App. 20a) The Plan provides, in relevant part, that Citizens' claim is "allowed" in its entirety, and that Bishay's and 1095 Comm. Ave.'s estates "may retain . . . settle, release or prosecute their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims")." (P. App. 23a-24a) The only claims that were alleged at the time of confirmation were the two counts in Bishay's pending counterclaim. (P. App. 25a) The Plan also provided for a continuing $500,000 lien on Bishay's assets to secure Citizens' contractual right, under the Loan Documents, to be reimbursed for fees and costs that it might incur in defending itself against Bishay's counterclaims. (P. App. 32a) The amount of the lien was established following an open court colloquy between the judge and counsel in which Citizens' lawyers asserted that Bishay was an excessively litigious individual who had the propensity to litigate out of proportion to the merits of the case. Litigation between Bishay and an unrelated party was highlighted to support this assertion. In response, Bishay's counsel stated that the then-pending two-count counterclaim was discrete and limited and thus only a small lien should be

allowed.[7] Finally, the Plan identified Citizens' claim as "impaired" because repayment of the defaulted loan was not

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7. The colloquy between the Judge and Bishay's counsel (Mr. Murphy) was as follows:

> THE COURT: . . . I want to hear you on why you think $500,000 is excessive. And as I recall what Mr. Baldiga's argument was on Thursday was — and Mr. Baldiga can correct me if I am wrong — but basically he was saying, "Mr. Bishay is litigious." . . . I mean that was what I understood his argument was for the $500,000, but I am willing to hear your argument as to whether it should be some different number.
>
> MR. MURPHY: Oh. I think it should be. I think equating the — what I understand to be the extraordinarily complicated facts and circumstances surrounding the *Chambers* litigation is far different from what I've read a counterclaim that was asserted pre-petition against the Bank in that — in the Norfolk Superior Court which basically said that the bank was engaging in unfair deceptive practices. The bank had coerced him into executing a forbearance agreement, and I think there was one other allegation in the complaint.
>
> * * *
>
> MR. MURPHY: . . . a discrete counterclaim . . .
>
> * * *
>
> THE COURT: . . . I certainly can look at the answer and counterclaim and make some determinations as to how involved the litigation is. . . .
>
> * * *
>
> THE COURT: . . . I also have looked at the defendants' answer and counterclaim. Is there any testimony you want to put on or offer of proof that you want to make,
>
> (Cont'd)

immediate; rather, repayment would not occur until the ensuing December.[8] Bishay never appealed the Confirmation Order.

Two months after confirmation, in June 1996, Citizens served its first summary judgment motion in the Superior Court seeking dismissal of the two-count counterclaim. (P. App. 21a) In August, Bishay sought leave to file an

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(Cont'd)

> Mr. Murphy, with respect to supporting your $250,000 set-aside?
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> * * *
>
> MR. MURPHY: I have nothing further to add. . . .
>
> * * *
>
> THE COURT: . . . I find that $500,000 is fair for the following reasons: based on the offer of proof that — with respect to what the cost of the *Chambers* litigation to date has been, based on my own experience litigating lender liability actions in this Court, and based on the — my reading of the defendants' answer and counterclaim and jury claim in the Norfolk Superior Court action as well as the Affidavit of Mr. Bishay, it seems reasonable for me to conclude that Citizens accepting $500,000 — a $500,000 lien on the assets of 75 Providence Highway is fair.

8. Bishay repeatedly confuses the meaning of an impaired claim under the Bankruptcy Code. A claim is impaired when it is paid in a manner different than that required by the contract creating the obligation in the first instance. Where a debt is due and owing as of the date of the filing of the petition for bankruptcy, a plan that proposes anything other than immediate and total payment renders a claim impaired. *See* 11 U.S.C. § 1124; *In re Tri-Growth Centre City, Ltd.*, 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992) (claim is impaired where proposed plan did not pay defaulted loan as of date of plan).

amended counterclaim.[9] The Superior Court allowed Bishay's motion to amend and denied Citizens' motion for summary judgment, "without prejudice to being renewed as to the amended answer and counterclaim. . . ." (*Id.*)

The new claims asserted by Bishay were not identified in his bankruptcy schedules nor in the Disclosure Statement the Bankruptcy Court otherwise found deficient. Bishay never initiated an adversary proceeding against Citizens alleging these claims prior to confirmation. While Bishay had written a rambling letter to Citizens' Chairman, Lawrence K. Fish, in mid-October 1995 expressing his general dissatisfaction with the entire history of his banking relationship with Citizens up to that point in time,[10] he never followed up on

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9. The amended counterclaim alleged the following six counts: Count I (breach of good faith and fair dealing); Count II (promissory estoppel); Count III (intentional interference with contractual and advantageous relations); Count IV (declaratory judgment as to the validity of the September 1994 Agreement); Count V (intentional infliction of emotional distress); and Count VI (violations of c. 93A). The original two counts of the counterclaim were restated in part in Counts III and VI of the amended counterclaim. The dismissal of those two counts on pure state law grounds has not been appealed.

10. One of the factual misstatements in the Petition is the assertion that this letter contained all of Bishay's claims against Citizens and thus Citizens was on notice of such claims at the time of confirmation. This is wrong. What ultimately became the focus of Bishay's state court claims once his claim of wrongful acceleration was dismissed, was the assertion that Citizens wrongfully refused full repayment of the loan in November 1995. This refusal allegedly prevented Bishay from securing the release of Citizens' liens on $18 million of real estate, which, in turn, prevented him from engaging in an initial public offering, the proceeds from which were earmarked for the opening of a series of automobile superstores across the country that, over the ensuing ten-year period, would have generated profits of over $90 million. Plainly, the October 1995 letter

(Cont'd)

that letter in any manner whatsoever in the ensuing six months leading up to the confirmation hearing. As seen earlier, as of the confirmation hearing, Bishay's own lawyer disavowed any claims against Citizens other than the two discrete claims set forth in his pending counterclaim.

In May 1997, Citizens filed its second summary judgment motion seeking dismissal of Bishay's entire counterclaim. (P. App. 21a) In November 1997, the Superior Court allowed Citizens' motion in part and denied it in part. (P. App. 34a) As to the four new counterclaims alleged by Bishay, the court held that they were barred by the res judicata effect of the Plan. The Superior Court held that "any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify the cause of action reserved." (P. App. 24a) Here, the "language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in the Superior Court at the time of the Order." (P. App. 26a)

As to the two previously pending claims that alleged untoward conduct prior to September 16, 1994, the Superior Court held that those claims were barred by the general release executed by Bishay as part of the September 1994 Agreement.[11] (P. App. 27a-31a) Five subsections of Bishay's

(Cont'd)

could not have put Citizens on notice of a claim predicated on alleged conduct that was then over a month from occurring. Significantly, the Appeals Court held that Bishay never tendered payment as alleged and that Citizens never wrongfully refused to accept any such payment. (R. App. 8a and n.11)

11. Bishay sought to vitiate the general release by alleging economic duress. That defense was unsuccessful, and Bishay did not appeal that determination. Indeed, on appeal to the Appeals Court, Bishay argued for reinstatement of those claims only to the extent they alleged conduct post-September 1994. (*See* R. App. 7a)

c. 93A claim survived the first summary judgment motion. (P. App. 34a) Ultimately, after two cross-motions for reconsideration, these five subsections were dismissed on the basis of res judicata,[12] the doctrine of absolute privilege and the inability to prove damages as required under c. 93A. (R. App. 19a-26a; 35a-38a)

Bishay appealed to the Appeals Court which affirmed all of the judgments of the Superior Court.[13] The Appeals Court adopted the reasoning of the Superior Court and found "no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim." (R. App. 4a-5a at n. 6.) The Appeals Court further found no merit to Bishay's assertions that: (1) the classification of Citizens' claim as impaired meant approval of that claim was not final; (2) he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens; or (3) the court should consider statements made by Citizens' counsel at the confirmation hearing. (*Id.*)

The Appeals Court alternatively found that all claims based on post-September 1994 conduct were dismissable for failure of proof. (R. App. 7a-9a)

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12. This dismissal based on res judicata is different from that being appealed here. It arose from the Bankruptcy Court's decision available at *In re 1095 Comm. Ave. Corp.*, 204 B.R. 284. *See* footnote 3, *supra*.

13. The Appeals Court's decision is an unpublished summary decision pursuant to its Rule 1:28. Such decisions "are not to be relied upon or cited as authority in unrelated cases." *Lyons v. Labor Relations Comm'n*, 19 Mass. App. Ct. 562, 566 (1985), *rev'd on other grounds*, 397 Mass. 4981 (1986). This rule exists because such decisions are not vetted by the entire court and, while binding on the parties, may not disclose fully the facts of the case or the rationale of the judges' decision. *Id.* at 566 n.7.

* * *

As the Southern District of Texas aptly stated:

> The institution of bankruptcy exists to give debtors a fresh start, not to allow debtors to seek revenge against creditors who were difficult in earlier business dealings. General retention clauses are not convenient hiding places for debtors. While a debtor is not forced to abandon claims before they are known, a debtor must disclose those claims that are likely. A claim with potential is a potential asset. The creditors have a right to know what the debtor's assets are even though the potential may be contingent, dependent, or conditional. While [the debtor] did not have to give an exact dollar value for the claim, it was obliged to give an estimate. Rather than make a good faith attempt at disclosure, [the debtor] chose not to estimate a value for this claim on the ground that "causes of action are difficult to value." The code requires adequate disclosure, not selective disclosure. Because [the debtor] failed to disclose its claim against [the creditor], it will be barred.

Westland Oil Dev. Corp., 157 B.R. at 103.

1. There Is No Basis For Interpreting The Plan Against Citizens

Faced with his own failure to properly preserve the claims he first filed post-confirmation, Bishay proffers here, as he did below, several arguments why the reservation clause should be rewritten. One of his arguments is that the Plan is essentially a contract that was drafted by Citizens, and thus should be interpreted against Citizens (i.e., expansively). However, Bishay's argument overlooks the essential nature

of the confirmation process and the basic obligations each party has to protect its own interests. In the first place, a confirmed plan is simply not subject to rules of contract construction. As one court put it:

> [a] creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable.

Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982).

Moreover, the Plan, though originally presented by Citizens due to Bishay's intransigence in putting forth his own plan, was not simply accepted by the court or the parties. Rather, it was subject to significant input from all sides. In this context, it was up to Bishay (and his lawyers) to be sure Bishay's claims were preserved to the extent he wanted them preserved. As the court stated in *In re DiBerto*:

> The confirmation of a plan under Chapter 11 creates new contractual obligations of the reorganized debtor. In that context, parties-in-interest are obligated to make sure that they have no problem with the literal language of the new contractual obligations and provisions dealing with the disposition of the assets of the debtor.

171 B.R. 461, 477 (Bankr. D.N.H. 1994).[16]

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16. To the extent that Bishay is dissatisfied with the legal effect of the language agreed to in the Plan, that is an issue between Bishay and his bankruptcy counsel. *See In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 546 (M.D. Tenn. 1983) (parties "may not be relieved

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APPENDIX A — MEMORANDUM AND ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 22, 2002

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-P-798

CITIZENS BANK OF MASSACHUSETTS

vs.

BAHIG BISHAY[1] & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal by the defendants (collectively Bishay), is from the entry of a judgment ordered in 1999 by a Superior Court judge in favor of Citizens Bank for $360,427.99 for attorney's fees and costs which were allowed as reasonable collection costs relating to a loan made to Bishay in 1988 (A.4225,4229). Bishay also appeals from three prior summary judgement orders of the same judge which dismissed his

1. Individually and as trustee of Old Post Road Realty Trust and Commonwealth Realty Trust.

2. Bishay Motors & Leasing, Inc., formerly known as Bishay Motors, Inc.; Massachusetts Auto. Group, doing business as Bishay Isuzu; U.S. Auto Exchange Group Ltd.; and 1095 Commonwealth Ave. Group (A.2).

counterclaims against Citizens Bank related to its collection of the loan (A.4230). The loan was repaid through a proceeding in the United States Bankruptcy Court, concluded pursuant to a confirmatory order issued in 1996 (A.288,4230).

In this appeal, Bishay principally presents the issue whether, and to what extent, his rights were preserved in the bankruptcy proceeding to pursue his counterclaims against Citizens Bank in the Massachusetts courts (B.Br.3-4). He argues that the Superior Court judge's rulings, principally based on res judicata grounds, did not reach the full extent of those claims and thereby deprived him of his day in court. We conclude the judge's decisions were correct and affirm.

Citizens Bank commenced this action in June, 1995, by filing a verified complaint in the Superior Court (A.19). Bishay's answer contained a counterclaim in two counts, the first alleging a breach of good faith and fair dealing, and the second an alleging unfair trade practices under G.L. c. 93A (A.70,74). Bishay then filed two voluntary petitions in bankruptcy, the first in July, 1995, for 1095 Commonwealth Ave. Corp., and the second, individually, in September, 1995, which subsequently were consolidated for administration (A.218). The plan, confirmed by order of the Bankruptcy Court in April, 1996, permitted Bishay to pursue his counterclaim.[3] After Citizens Bank moved in the Superior Court to dismiss the counterclaim in June, 1996, Bishay moved to

3. The plan allowed Citizens Bank's claim for payment of the loan balance and also allowed retention of a lien on Bishay's assets to permit recovery of attorney's fees and costs in defending against Bishay's counterclaim (A.279-280).

amend it, and the amendment was allowed by a motion judge in November, 1996 (A.690), resulting in a counterclaim of six counts (A.692-726). Four decisions by a different Superior Court judge followed, resulting in the dismissal of Bishay's entire amended counterclaim and the award of collection costs to Citizens Bank.

1. *Application of res judicata.* In the first of the Superior Court orders challenged by Bishay in this appeal, the judge considered the parties' cross motions for summary judgment on Bishay's several counts in the amended counterclaim (A.2205,2216). The judge correctly stated the controlling principle as follows: "The application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on all claims and issues concerning the debtor-creditor relationship that were actually raised during the confirmation process as well as those that could have been raised. . . ." (A.2219). See *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 & n.8 (1st Cir. 1995) (res judicata principles applicable to confirmation orders of a bankruptcy court). "Under a generally accepted exception to the res judicata doctrine, a party's claims are not precluded by a prior action if the court in that action expressly reserves those claims for later adjudication. *Apparel Art Intern. v. Amertex Enterprises[, Ltd.]*, 48 F.3d 576, 586 (1st Cir. 1995). *D & K Properties Crystal Lake v. Mutual Life Ins. [Co.]*, 112 F.3d 257, 260 (7th Cir. 1997)." (A.2220).

The judge reviewed the relevant language in the reservation clause of the plan confirmed by the Bankruptcy

Court,[4] correctly concluding from its wording and the record in that court that the original two counts in Bishay's counterclaim had not been adjudicated in that court and had been preserved so as to survive the confirmation order. Moreover, he stated those two counts "constitute independent claims which could be characterized as a set-off to Bishay's debt." (A.2222).

In contrast, however, the judge concluded that the additional four claims in the amended counterclaim[5] were in the nature of defenses to Bishay's obligations under the note, and that he essentially sought to relitigate the validity of that note and the forbearance agreement.[6] These additional

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4. "The Debtors' estates may retain, and by its duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." (A.280).

5. We adopt the judge's summary description of the counts as follows: (I) allegations of "numerous breaches of [Citizens Bank's] express and implied duties" under the note and a forbearance agreement; (II) a claim that Citizens Bank is "estopped from treating the Note as a demand obligation and collecting the full amount"; (III) first count of prior counterclaim restated; (IV) a request for a declaratory judgment that the "Note and Forebearance Agreement are extortionate," and all payments should be ordered disgorged; (V) a claim of intentional infliction of emotional distress; and (VI) second count of prior counterclaim restated. (A.2222-2224; 712-724).

6. There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would

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eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *D & K Properties Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d at 261.

Bishay's assertion that classification of Citizens Bank's claim as "impaired," means that approval of the claim was not final (B.Br.18), is without merit. That assertion ignores the plain language of section 6(a) of the reorganization plan which required full payment of the loan balance on or before December 27, 1996 (A.279). Further, no reasonable reading of 11 U.S.C. § 1124 (1984) supports that assertion.

There also is no merit in Bishay's assertion that he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens Bank. Compare *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (approval of a plan by a creditor "cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable"). Moreover, there is no indication that Bishay did not have adequate opportunity to contest the plan or seek its modification.

Similarly, there is no merit in Bishay's request that we consider statements made by counsel for Citizens Bank at the confirmation hearing (B.Br.20-23). Compare *Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (even comments by a judge in a colloquy with debtors were "not dispositive of . . . allegedly reserved right," and did not affect application of res judicata principles). In the judge's third decision he stated, "Bishay now asks this Court yet again to adopt his interpretation of the reservation [clause]. This the court declines to do." (A.3392). We similarly decline any invitation by Bishay to consider any reinterpretation by reading any "intent" into the reservation clause (see B.R.Br.2-8).

claims were not expressly identified in the reservation clause, the bankruptcy schedules (A.3224-3267), or in the previously filed counterclaim in Bishay's answer to Citizens Bank's complaint.[7] Because the Bankruptcy Court ordered the payment of Citizens Bank's claim, inherent in that order is the court's determination of the validity and enforceability of the note and forbearance agreement. The judge therefore properly stated that "[f]inal orders of the bankruptcy court are res judicata as to all matters that were or could have been litigated before the bankruptcy court," see *Federal Deposit Ins. Corp. v. Shearson-American Exp., Inc.*, 996 F.2d 493, 497 (1st Cir. 1993), cert. denied, 510 U.S. 1111 (1994), and correctly concluded that the confirmation order had res

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7. The judge noted that the Bankruptcy Court allowed a joint motion on September 4, 1996, authorizing Bishay to employ special counsel to pursue the litigation then pending in the Superior Court, No. 95-1312A (A.2222 n.10).

There is no merit in Bishay's assertion that the counts in his amended counterclaim were preserved because his proposed version of that counterclaim was attached to a stipulation filed in the Bankruptcy Court with respect to a fee dispute. That filing occurred before the joint motion was allowed, and there is no indication that the amended counterclaim was brought within the scope of that motion.

In any event, the amended counterclaim was first filed in the Superior Court in August, 1996, some four months after the confirmation order dated April 23, 1996 (A.294), and after the expiration of the applicable bankruptcy appeal period. Bishay did not appeal the confirmation order.

judicata effect as to counts I, II, IV, and V of Bishay's amended counterclaim (A.2219,2224).[8]

2. *The surviving claims in the amended counterclaim.* Bishay seeks to pursue his dismissed amended count III and most of the count VI claims by raising events which occurred after the general release in a September 16, 1994, forbearance agreement he executed.[9] He argues that these counts were preserved by the reservation clause, and he asserts that the judge improperly dismissed those claims, essentially ignoring the effect of the release and res judicata (B.Br.27-48).[10]

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8. The judge subsequently denied Bishay's two motions for reconsideration of these rulings in his second and third decisions (A.2481-2482, 3391-3395).

9. In his first decision, the judge addressed Citizens Bank's contention that the general release served as a defense to count III and so much of count VI concerning events occurring prior to the release, and Bishay's claim that the release was not binding because he signed it under economic duress (A.2225). The judge's conclusion that Bishay's failure timely to object to the forbearance agreement, his subsequent conduct in accepting the benefits of Citizens Bank's forbearance, and his partial performance in making sporadic payments, constituted ratification of the agreement. The judge further concluded that because the general release was valid and binding, Bishay is precluded from asserting any claim against Citizens Bank arising from their relationship prior to September 16, 1994, and allowed summary judgment for Citizens Bank on count III and subsections a, b, c, d, e, g, h, and i of count VI (A.2229).

10. In the judge's second decision, he declined to reconsider his prior rulings on count III after Bishay filed a motion for reconsideration and submitted a joint stipulation which contained

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Appendix A

Bishay asserts that in 1995, Citizens Bank's refusal to accept full payment of the loan constituted (1) a breach of its obligations to him; (2) interfered with his business obligations; and (3) violated c. 93A (B.Br.31).[11] Even if we were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c. 93A claim to the extent that it was based on Citizens Bank's collection efforts. Also, Bishay's argument (B.Br.36-44) attempting to revive his claim for intentional infliction of

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a proposed amended counterclaim. The judge rejected consideration of Bishay's claims alleging interference with contractual relations after the September 16, 1994, release, and declined to alter his ruling that only the two claims pending in the Superior Court at the time of the bankruptcy confirmation order had been preserved (A.2477-2479, 2481-2482).

11. The related factual background is that after filing the bankruptcies, in November, 1995, Bishay asked what terms Citizens Bank would require to discharge all its security for the defaulted loan if he could obtain financing to repay the loan. The response was that a release of all theoretical claims would be required (A.642-646). Bishay claims the collateral then securing the loan balance of $2.4 million was, disproportionally, worth $18 million (B.Br.30).

emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive, and unscrupulous and violative of c. 93A, fail to raise genuine issues of material fact.

With respect to Bishay's c. 93A argument (B.Br.45-48) based on Citizens Bank's two-tiered billing arrangement with its attorneys, for which it was sanctioned in the Bankruptcy Court (A.1310-1350), Bishay asserts that a causal relationship existed between that arrangement and Citizen Bank's refusal to accept payment of the loan in 1995, and contrary to the judge's conclusion, that he suffered damages. There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were caused by Citizens Bank's involvement in the two-tiered fee arrangement (A.3396-3398).[12]

3. *Award of attorney's fees.* In his fourth decision, and after a thorough analysis of the parties' claims, the judge determined that Citizens Bank had a right to recover $360,427.99 in attorney's fees and costs incurred as the

12. Acting on a motion of Citizens Bank for reconsideration, the judge addressed the c. 93A issues raised in subsections f and k of count VI in his third decision (A.3396). He concluded that Bishay had not suffered any monetary loss in the course of the Bankruptcy Court's resolution of the two-tiered fee issue. He explained that "the amount of fees owed by Bishay was reduced to reflect the amount Citizens [Bank] itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens [Bank] under the loan agreement." (A.3397).

reasonable costs of collection of the loan from April 25, 1996, through November 30, 1998 (A.4224). Bishay claims that the note was paid "some time before a substantial part of those legal fees were incurred," and accordingly when the note was paid, the fees incurred thereafter could not constitute reasonable fees for "collection and enforcement" of the note (B.Br.49). Arguing this point for the first time in this appeal (see memorandum in opposition to summary judgment at A.3702-3721), Bishay is not entitled to consideration of that argument in this court. See *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977).

In any event, Bishay fails to show that the language of the note (A.32), his guarantees (A.40,44,56), or the relevant provisions of the Bankruptcy Court's approval of a lien on his assets (A.280), restricted his contractual obligations after the note was paid. He also fails to show how the fees awarded were not related to litigation arising out of the collection process, or that there was any error in the judge's thorough analysis of the course of this litigation (A.4216-4224).[13] The judge properly concluded that "Bishay vigorously pursued his purported $100 million counterclaim against [Citizens Bank] to no avail, despite his clear contractual obligation to pay . . . collection costs in the event his claim

13. The judge noted that the fees requested represented nearly two thousand hours of work, that Bishay asserted a counterclaim he valued at $100 million, involving complex issues of bankruptcy law, res judicata, contract, and c. 93A, and the filing of over one hundred pleadings. He stated that "every point on every issue was vigorously contested by both parties," and that Citizens Bank ultimately succeeded in obtaining judgment in its favor on Bishay's entire counterclaim (A.4220).

was unsuccessful." (A.4224). Although Citizens Bank's claim with respect to the unpaid loan balance was satisfied on December 27, 1996,[14] because Citizens Bank's complaint and Bishay's counterclaim then were pending in the Superior Court, it cannot be said that the parties had reached an end to all "charges of the holder . . . in connection with the collection and enforcement of [the note]." (A.32). Bishay's counterclaim was grounded in allegations of improper conduct by Citizens Bank in collecting the note, which Bishay not only pressed after the note had been paid, but had he been successful, he essentially would have overturned the validity of Citizens Bank's collection of the note. Citizens Bank incurred additional fees and costs in withstanding Bishay's continuing attack on the validity of its collection of the note, and those fees and costs properly were an integral part of the collection process. Compare *Penney v. First Natl. Bank of Boston*, 385 Mass. 715, 723 (1982) (attorney's fees and costs incurred by bank in defending against debtor's action brought after sale of debtor's collateral "were an integral part of the collection process").[15] See *Leventhal v. Krinsky*, 325 Mass. 336, 342 (1950); *Covich v. Chambers*, 8 Mass. App. Ct. 740, 752 (1979).

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14. The Bankruptcy Court order regarding discharge of debtors states in relevant part: "In accordance with the terms of the Confirmed Plan, all claims of creditors were satisfied in full on December 27, 1996 with the exception of certain legal fees and costs of Citizens Bank. . . ." (A.3070-3071).

15. Bishay no longer challenges the judge's conclusion that Citizens Bank was entitled to $117,765.24 in fees as a prevailing party in connection with its first motion for summary judgment, an amount which was included in the total award (A.4223-4224).

Appendix A

4. *Costs incurred after judgment and in this appeal.* Citizens Bank requests attorney's fees and costs it claims were allowed in the Superior Court, and to March 17, 1999, when the award was entered (C.B.Br.45-46). Because this request concerns matters beyond our purview in another court, we decline to consider the request. Citizens Bank may, however, request its attorney's fees and costs in connection with this appeal by filing a petition with this court, together with the necessary back-up materials, within fifteen days of the issuance of the rescript in this case. Bishay shall have ten days to respond to that submission, in accordance with *Yorke Mgmt. v. Castro*, 406 Mass. 17, 20 (1989).

Judgments affirmed.

By the Court (Jacobs, Cypher,
& Kantrowitz, JJ.)

s/ Ashley Ahern
Clerk

Entered: October 22, 2002.

* * *

APPENDIX D — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED MARCH 17, 1999 AND FILED MARCH 18, 1999

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR AWARD OF COLLECTION COSTS AND DEFENDANTS' CROSS-MOTION FOR ENTRY OF SEPARATE JUDGMENT

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

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Appendix D

II. CITIZENS' MOTION FOR APPROVAL OF AWARD OF COLLECTION COSTS

Citizens now seeks an award of attorneys fees and costs in the amount of $360,614.63 incurred through November 30, 1998 in defending against Bishay's unsuccessful counterclaim. The original promissory note dated June 8, 1988 provided:

> The maker agrees to pay all charges of the holder hereof in connection with the collection and enforcement of this Note, including reasonable attorneys' fees.

Similarly, Bishay's guaranty of the note provided:

> Guarantor agrees to pay a reasonable attorney's fee and all other costs and expenses which may be incurred by Lender in the enforcement of Borrower's obligation or [sic] this Guaranty or both.

The September 16, 1994 Forbearance Agreement signed by Bishay also provided that he would pay the legal fees and expenses incurred by Citizens in connection with the Note.

In confirming Bishay's Chapter 11 Plan, the Bankruptcy Court (Keener, J.) concluded:

> Citizens is entitled under its loan documents, specifically Plaintiff's Exhibit 6, to retain its liens on all assets until all of its claims are fully

> satisfied. Citizens' claims include not only principal, interest, costs and attorneys' fees accrued to date but future contingent costs in connection with the debtor's state court counterclaims against Citizens Bank.

The Confirmed Plan thus provides that:

> until Citizens actually receives (in form and substance reasonably acceptable to it) a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claims.

On January 22, 1998, Citizens and Bishay agreed to replace the $500,000 lien on Bishay's assets with an irrevocable Letter of Credit issued by Ocean Bank of Miami, Florida.

A. *NECESSITY OF A HEARING*

As a threshold matter, Bishay seeks an evidentiary hearing on the matter of Citizens' collection costs. With respect to an award of fees or costs, "a losing party who seeks to challenge factual issues raised by the affidavits and vouchers of the prevailing party must have an opportunity to be heard." *Waldman v. American Honda Motor Co.*, 413 Mass. 320, 328 (1992). See also *Boynton v. Tarbell*, 272 Mass. 142, 146 (1930) (probate court award of attorney's

fees against estate); *In re Matter of a Grand Jury Subpoena*, 411 Mass. 489, 501 (1992) (court's discretionary award of expense reimbursement to recipient of subpoena duces tecum); *J.P. Construction Co., Inc. v. Stateside Builders, Inc.*, 45 Mass. App. Ct. 920, 920 (1998) (award of attorney's fees under G.L. c. 149, § 29).

Under Massachusetts law, where one party contracts to pay the other's attorney's fees, the standard for recovery is fair and reasonable compensation for the services rendered. *Margolies v. Hopkins*, 401 Mass. 88, 93 (1987); *MIF Realty, L.P. v. Fineberg*, 989 F. Supp. 400, 402 (D. Mass. 1998). The court should consider time expended, customary hourly charges, the attorney's reputation, the demand for his services, the stakes involved in the case, the results secured, and the customary charges for similar services by others. *Cummings v. National Shawmut Bank of Boston*, 284 Mass. 563, 565 (1934); *Margolies v. Hopkins*, *supra* at 93. The documents in the present case explicitly require the fees recovered by Citizens to be reasonable.

A review of the record reveals that Bishay's brief has failed to sufficiently challenge Citizens' affidavits and vouchers to raise a factual issue which would necessitate a hearing. In demanding a hearing, Bishay does not contend that the number of hours spent on the litigation or the rate charged are unreasonable, issues that might require testimony beyond the parties' written submissions. Rather, his only specific objections to the fees are that he should not have to pay the $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or fees incurred in resisting Bishay's June 12, 1997 motion to

compel, which was granted. In addition, he contends that the Stoll affidavit claims entitlement to fees Citizens was not obligated to pay by contract. These legitimate concerns can be adequately and fairly addressed based on a careful review of the extensive documentary record before this Court.

B. *FEE AWARD*

Having carefully reviewed Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court makes the following award of collection fees and costs.

1. *General Findings*

Brown, Rudnick, Freed & Gesmer, P.C. (Brown, Rudnick) has represented Citizens in the present litigation since April of 1996. Attorney James W. Stoll (Stoll), who has been the principal attorney for citizens in this case, has 14 years experience in practice and has represented numerous banks as well as the FDIC in lender liability matters. Stoll was assisted primarily by Attorney Elise Busny, who has five years experience in practice, and by paralegal Susan Oldham.

Pursuant to the fee agreement between Citizens and Brown, Rudnick, Citizens was billed for services at a blended rate of $205 per attorney per hour. This Court finds the blended rate to be fair and reasonable. Indeed, said rate is lower than Brown, Rudnick's standard rates, which are commensurate with those charged at other firms of a similar

size and reputation. For example, Stoll's regular hourly rate varied from $275 to $325 during the period relevant to this litigation. In addition, pursuant to the fee agreement, Citizens was billed for paralegal services at the standard rate of $130 per hour. This Court also finds this rate to be fair and reasonable.

Two affidavits by Stoll set forth itemized invoices billed to Citizens by Brown, Rudnick for the period from April 25, 1996 through November 30, 1998. These invoices represent $329,207.55 in fees for close to 2,000 hours of work, as well as $31,407.08 in expenses. While this amount is large, it should be emphasized that at issue in the present litigation was a counterclaim which Bishay consistently asserted was worth $100 million. Since May of 1996, in excess of one hundred pleadings have been filed in this matter, none of which has been brief. Indeed, every point on every issue was vigorously contested by both parties. Bishay's counterclaim involved complex issues of bankruptcy law and res judicata as well as more basic contract and Chapter 93A matters. Through a series of decisions by this Court, Citizens ultimately succeeded in obtaining judgment as a matter of law on Bishay's entire counterclaim.

2. *Bishay's Objections*

This Court will now address each of Bishay's objections to Citizens' receipt of collection costs. Bishay first raises the familiar refrain that Citizens' misrepresentations with respect to its dual billing agreement with Brown, Rudnick bars it from recovering any collection costs under the loan documents. This argument has already been twice rejected,

first by the Bankruptcy Court in the fall of 1996, and then by this Court in its November 27, 1997 Memorandum and Decision of Order on Bishay's cross-motion for summary judgment. Notwithstanding Bishay's persistence in pressing such a claim, this Court declines to find Citizens' entitlement to collection costs to be affected by the existence of the dual billing agreement and its conduct before the Bankruptcy Court with respect thereto. Bishay also makes a cursory argument that Citizens should be barred from recovery because it has made repeated misrepresentations to this Court throughout the course of the present litigation. Bishay's allegations in this respect are wholly unsubstantiated and serve only to highlight his unwillingness to honor his contractual obligation to reimburse Citizens for its fees and costs in defending against his unsuccessful counterclaim.

Bishay further contends that Citizens is not entitled to fees because it has failed to demonstrate that it actually paid the requested legal fees and expenses to Brown, Rudnick. This argument lacks merit, given that Stoll's affidavit specifically states that the itemized fees and costs sought have either already been paid by Citizens or are currently owed by Citizens to Brown, Rudnick.

Bishay next complains that Citizens seeks to collect fees and expenses which it was not obligated by contract to pay Brown, Rudnick. In accordance with Citizens' May 1995 outside Counsel Policies and Procedures Manual, Citizens generally does not pay for inter-office conferences; excessive review of files, memoranda and pleadings; or multiple lawyer attendance at meetings or depositions unless approved in advance. Further, Citizens does not pay for routine in-house

photocopying, telephone, telecopying and facsimile charges; secretarial overtime; or meals, unless necessitated by overnight travel. With respect to computerized research, Citizens will pay only for use charges. Brown, Rudnick was pre-approved to perform computerized research as necessary in connection with the present case.

Bishay asserts that "Approximately $100,000 was billed for review of pleadings, papers and files which Citizens expressly refuses to pay." Citizens' itemizations do indeed reveal a multitude of hours spent by Brown, Rudnick reviewing its own pleadings, memoranda and files. Nonetheless, after carefully examining the time records, this Court did not discern excessive hours spent reviewing documents.

Further, Citizens' itemized invoices reveal numerous hours spent conferencing between attorneys on the case. However, Citizens' protocol states with respect to inter-office conferencing that "only the time of the highest-paid participant will be paid for, then only when the conference advances the matter." It appears that Brown, Rudnick adhered to this policy in its invoices, because on any particular date, only one attorney, not both, billed for conferencing activity. Again, a review of the records does not reveal any obviously excessive hours spent in inter-office conferences, and in a complex case such as this one, involving more than one trial counsel, some conferencing is to be expected.

With respect to expenses, although the invoices set forth a total of $7,851.68 for "copies," it is only routine in-house photocopying for which Citizens will not pay. The only items

which do not appear to comport with Citizens' protocol are $57.64 in meals which is not accompanied by itemized overnight travel, and $129 in "misc. expenses" which is not sufficiently itemized given that the protocol states that Citizens will not pay for non-specific billing entries. Accordingly, this Court will reduce the expenses collected by Citizens by that amount.

Finally, Bishay contends that he should not have to pay approximately $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or those fees incurred by Citizens in resisting his June 12, 1997 motion to compel, which was granted. In general, a litigant must qualify as a prevailing party in order to receive an award of attorney's fees. *Bonofiglio v. Commercial Union Ins. Co.*, 412 Mass. 612, 613 (1992). However, this Court has found no authority for the proposition that a prevailing party's success should be gaged by each individual procedural step and/or motion rather than by the overall result achieved in the case. Accordingly, Citizens's fees need not be reduced by those hours spent unsuccessfully resisting Bishay's June 12, 1997 motion to compel.

Moreover, Citizens did prevail to a large extent on its first summary judgment motion, obtaining judgment in its favor on five out of six counts of the counterclaim and successfully opposing Bishay's cross-motion for partial summary judgment. More importantly, Citizens' failure to receive summary judgment on one count of Bishay's counterclaim does not render the work done in preparation for the motion unnecessary or unreasonable. This Court

concludes that the portion of the summary judgment motion on which Citizens did not succeed cannot be severed from the successful portions so as to permit a rational diminution of fees. See *Rini v. United Van Lines, Inc.*, 903 F. Supp. 234, 238 (D. Mass. 1995), rev'd on other grounds, 104 F.3d 502 (1st Cir. 1997).

As the Appeals Court has noted, "it is altogether appropriate that the person who, in doubtful circumstances, unleashes the dogs of war should bear the heavier burden of legal costs." *Strand v. Hubbard*, 31 Mass. App. Ct. 914, 915 (1991). In the present case, Bishay vigorously pursued his purported $100 million counterclaim against the bank to no avail, despite his clear contractual obligation to pay Citizens' collection costs in the event his claim was unsuccessful.

Accordingly, after careful review of Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court determines that Citizens Bank of Massachusetts has the right to recover $329,207.55 in reasonable attorneys fees and $31,220.44 in expenses/ costs incurred from April 25, 1996 through November 30, 1998 in connection with the claims of Bishay and 1095 Commonwealth Avenue Corp. against Citizens arising from transactions between Bishay, Commonwealth Avenue Corp. and Citizens.

Appendix D

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' motion for entry of separate and final judgment pursuant to Mass. R. Civ. P. 5a(b) be *DENIED*. It is further ORDERED that judgment shall enter for plaintiff Citizens Bank of Massachusetts for reasonable collection costs in the amount of three hundred sixty thousand, four hundred and twenty-seven dollars and ninety-nine cents ($360,427.99) jointly and severally against defendants Bahig Bishay, individually and as Trustee of the Old Post Realty Trust; Commonwealth Realty Trust; Hishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc.; Massachusetts Auto Group, Ltd.; and 1095 Commonwealth Ave. Corp.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Court

DATED: March 17, 1999